

NATEC MINERALS, INC.

IBLA 92-555

Decided April 24, 1998

Appeal from a decision of the Colorado State Office, Bureau of Land Management, dismissing a protest of public land exchange COC-50831.

Affirmed.

1. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

A protest against an exchange of public land for private land under the authority of section 206 of the Federal Land Policy and Management Act of 1976 is properly dismissed if the protestant does not establish that the proposed exchange would violate the Act and applicable regulations, or contravene the public interest. While the owner of adjacent land may be individually inconvenienced by an exchange that transfers the surface estate out of Federal control, this fact alone is insufficient to establish that the exchange is not in the interest of the United States.

2. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Exchanges--National Environmental Policy Act of 1969: Environmental Statements

An environmental assessment of a proposal to exchange public for private land is sufficiently detailed where review of the reasonably foreseeable impacts of the exchange, including likely development of the land, failed to disclose a potentially significant impact and there was no evidence to the contrary.

3. Administrative Procedure: Hearings--Hearings--Rules of Practice: Appeals: Hearings--Rules of Practice: Hearings

Although the Board has discretionary authority to order a hearing before an administrative law judge pursuant to 43 C.F.R. § 4.415, it normally orders a hearing only when an appellant presents a material issue of fact requiring resolution through the introduction of testimony and other evidence not readily obtainable through the ordinary appeal procedure. If no oral testimony is

required and an appeal can be resolved relying on documentary submissions, a request for a hearing is properly denied.

APPEARANCES: Timothy R. Buchanan, Esq., and Randy L. Kloberdanz, Esq., Boulder, Colorado, for Appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

NaTec Minerals, Inc. (NaTec), has appealed from a Decision of the Colorado State Office, Bureau of Land Management (BLM or Bureau), dated June 17, 1992, dismissing its protest of land exchange COC-50831.

In a Notice of Realty Action (NORA) published at 56 Fed. Reg. 24087 on May 28, 1991, BLM announced that it had identified 680 acres of public land and an administrative access easement 1/ as preliminarily suitable for exchange to Aaron C. Woodward for 270 acres of private land. 2/ The Bureau stated that the exchange proposal, which had been developed cooperatively between BLM and Woodward, was "Bureau-benefiting," and that the proposal was being made "to provide legal access to federal lands and to consolidate public and private land holdings." 3/ 56 Fed. Reg. at 24088.

1/ The public lands identified for the exchange are described below:

"T. 3 S., R. 94 W., 6th P.M.

Sec. 33: SE 1/4 NE 1/4, E 1/2 SE 1/4

"T. 4 S., R. 94 W., 6th P.M.

Sec. 26: SW 1/4 NW 1/4, S 1/2 SW 1/4, SW 1/4 SE 1/4

Sec. 34: E 1/2 NE 1/4, NE 1/4 SE 1/4

Sec. 35: NE 1/4 NW 1/4, W 1/2 W 1/2, NE 1/4 SE 1/4

Sec. 36: NW 1/4 SW 1/4"

The lands would include an administrative access easement through T. 4 S., R. 94 W., sec. 34: SE 1/4 NW 1/4.

2/ The 270 acres of private land are described below:

T. 4 S., R. 94 W., 6th PM.

Sec. 33: E 1/2 SW 1/4 SE 1/4, SE 1/4 SE 1/4

Sec. 34: NE 1/4 NE 1/4 SW 1/4, S 1/2 N 1/2 SW 1/4, S 1/2 SW 1/4, W 1/2 SE 1/4

3/ The following reservations would be made in the patent issued to Woodward for the public land:

"1. A reservation to the United States of a right-of-way for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

"2. A reservation to the United States of all mineral deposits of known value.

"3. A reservation of all existing and valid land uses, including grazing leases, unless waived.

"4. The reservation of power line rights-of-way C-0108739, C-22713, and C-23562.

"5. The reservation of pipeline rights-of-way C-018388 and C-048809.

"6. The reservation of oil and gas leases C-34543, C-36955, C-38437, C-44376, C-44959, and C-51162."

In its protest, NaTec explains that it owns land located adjacent to a portion of the public lands to be exchanged to Woodward, and owns water rights which historically were stored on a portion of the public lands to be exchanged to Woodward. NaTec states that a portion of its land and water rights were acquired from Woodward. In addition, NaTec owns access and ditch easements across land owned by Woodward. NaTec asserts that it uses its land, in part, for the storage of water in a storage reservoir known as Larson Reservoir. NaTec claims that the Larson Reservoir water right and other water rights near the land proposed for exchange to Woodward are "crucial" to NaTec's mining four Federal sodium leases. NaTec's argument is set forth below:

2. The land owned by NaTec is used, in part, for the storage of water diverted out of Piceance Creek and Nineteen Creek, also known as Nineteen Mile Creek. The storage reservoir is known as Larson Reservoir, and a judicial decree determining the water right for Larson Reservoir was entered by the District Court in and for Garfield County on May 10, 1889, in Case No. 133. * * * The decree for the Larson Reservoir water right provides that the water right was originally diverted on July 20, 1888, and that up to approximately 62 acre-feet of water may be stored under the water right. The Larson Reservoir water right is one of the most senior water rights in the Piceance Creek basin. Investigations by NaTec indicate that the Larson Reservoir water right inundated a portion of the land proposed to be exchanged to Aaron C. Woodward. Pursuant to the Act of July 26, 1866, 43 USCA 661, *et. seq.*, NaTec is the owner of a right-of-way on the public lands for the storage of water in Larson Reservoir. NaTec asserts that the proposed exchange of lands may interfere with NaTec's use of the Larson Reservoir water right and NaTec's easement on the public lands.

3. NaTec is also the owner of four federal sodium leases comprising approximately 8,224 acres in the Piceance Creek Basin and Yellow Creek Basin in Rio Blanco County, Colorado. The sodium leases are designated as Lease Nos. C-0118326, C-0118327, C-0119986, C-37474 (out of C-0119985), and copies of the sodium leases are attached as Exhibit D. NaTec is conducting mining activities on the sodium leases, and the Larson Reservoir water right and other water rights located near the land proposed to be exchanged to Aaron C. Woodward are crucial to the operation of mining activities. The water supply for the mining operations on the sodium leases are the subject of Case No. 88CW420 pending in the Water Court in and for Water Division No. 1. NaTec anticipates that the Water Court will enter a decree that, among other things, determines an additional water right for Larson Reservoir. NaTec anticipates that the final decree entered by the Water Court will provide that an additional six hundred acre-feet of water may be diverted and stored at the Larson Reservoir site

and, subject to appropriate permits from the Bureau of Land Management, a portion of the proposed exchange lands would be inundated by water stored in Larson Reservoir. NaTec asserts that the proposed exchange would adversely affect and interfere with NaTec's use and operation of the sodium leases, and the enlargement of the Larson Reservoir. It should also be noted that if the proposed exchange of lands is completed, NaTec will have the power under Colorado law to condemn the lands acquired by Aaron C. Woodward. See, e.g., Colorado Constitution, Article XVI, Section 7.

4. NaTec may currently access public lands from the Larson Reservoir site. If the proposed exchange of lands is completed, NaTec will be precluded from accessing public lands. Except for the adjacent public lands, NaTec's property is surrounded by land owned by Aaron C. Woodward. The proposed exchange of land appears to be calculated to sever NaTec's ability to access the public land, and thereby attempt to regulate or charge a fee to NaTec for the use of the public lands. NaTec strongly objects to the termination or elimination of NaTec's access to the public lands as contemplated by the proposed exchange.

5. NaTec further asserts that the proposed land exchange is (a) contrary to the public interest, (b) inconsistent with the land use plans for Rio Blanco and Garfield Counties, and (c) not an equal value exchange.

6. The Notice of Realty Action erroneously identifies a portion of the lands to be exchanged as located in Garfield County, Colorado, but the lands in question are in fact located in Rio Blanco County, Colorado.

(Protest at 1-2.)

In its Decision dismissing NaTec's protest, BLM states that "[i]nformation provided with the protest and from other sources places the 'Larson Reservoir' on nonfederal land in the SW 1/4 NE 1/4 and W 1/2 SE 1/4 of section 33, T. 3 S., R. 94 W., Sixth Principal Meridian, Colorado." The Bureau points out that the present "Larson Reservoir" as referred to in the protest seems to comprise two locations, one being in the NW 1/4 SE 1/4 of sec. 33, and the other in the SW 1/4 NE 1/4 of sec. 33. Based upon maps and aerial photographs, BLM concludes that neither reservoir impoundment "has historically encroached upon the public land described as the SE 1/4 NE 1/4 and E 1/2 SE 1/4 of section 33, sufficiently, if at all, to appropriate a right under the Act of July 26, 1866, 43 U.S.C.A. 661, et seq." The Bureau states that "[i]f the reservoir did, in fact, occupy some small portion of this public land prior to 1976 in conformance with the 1866 Act, the right exists and a land patent to complete the land exchange will not defeat that right." However, BLM states that "[i]f the impoundment did not extend onto the public land, no right exists." With regard to NaTec's

planned expansion of the Larson Reservoir, BLM states that there is no record of a right-of-way application for an expansion having been filed with or approved by BLM.

In response to NaTec's argument that if the exchange is completed NaTec would be precluded from accessing public lands, BLM agrees that NaTec's property would no longer be contiguous to public land. However, BLM emphasizes that public land to the east remaining after the exchange would be accessible by means of Garfield County Road No. 253, about 1 mile to the southwest of the NaTec property.

The Bureau rejected NaTec's contention that the exchange was not in the public interest, pointing out that NaTec offered no evidence in its protest to support the argument. The Bureau states:

The decision record for the environmental assessment prepared for the exchange proposal determined that the exchange would be in the public interest. It was based on an environmental assessment that considered the various resource values on both the offered nonfederal lands, and the public lands selected, and the potential beneficial and adverse effects if the exchange was completed. As your protest did not offer any reasons as to how the environmental assessment was incorrect, we must dismiss your assertion that the exchange is contrary to the public interest. Notice of the exchange was sent to the Board of County Commissioners for Garfield and Rio Blanco Counties and no comments or objections have been received from either county. Therefore, we must also conclude that the exchange is not inconsistent with the land use plans of either county.

(Decision at 2.)

The Bureau also rejected NaTec's argument that the exchange was not an equal value exchange. The Bureau explained that a qualified appraiser prepared the required fair market value appraisals of the lands offered and selected, which were approved by the BLM Colorado Chief State Appraiser. According to BLM, these appraisals indicate that the values are within the requirements of applicable regulations and appraisal standards and policy, and that a cash equalization payment by Woodward will offset a small difference in estimated fair market value between the offered and selected lands.

Finally, as to the contention that the NORA erroneously identifies a portion of the lands to be exchanged as located in Garfield County, while the lands are in fact located in Rio Blanco County, Colorado, BLM simply states that "all legal descriptions in the NORA are correct and it is clear which properties are involved in the exchange proposal." (Decision at 2.)

In its statement of reasons (SOR) for appeal, NaTec reiterates many of the arguments set forth in its protest. In addition, NaTec expands upon the mere assertion that the exchange is not in the public interest.

In making this argument, NaTec focuses upon the Environmental Assessment (EA) which BLM prepared for the exchange. NaTec points out that in section II.B. of the EA, BLM "concludes that the No Action Alternative would result in the continued lack of access to federal lands that would have to be resolved through other means," but that as discussed in section II.C.5 of the EA, "the alternative of constructing an alternate route around the offered private land existed, but was eliminated." (SOR at 3.) NaTec states that "[t]he rationale for eliminating this alternative was that construction of an alternative route would be more environmentally damaging than the use of the existing road across the offered private lands, but no further explanation as to how it would be more damaging is provided." (SOR at 3-4.)

NaTec contends that BLM erroneously concludes in section III of the EA that air quality would not be affected by any of the alternatives regarding the land exchange, given that one of BLM's "stated purpose[s] for the land exchange was to provide public and administrative access to other federal lands." (SOR at 4.) NaTec argues that "[t]his increased access will result in increased public and commercial vehicle traffic, which will necessarily affect air quality, which the Environmental Assessment failed to address." Id.

NaTec next challenges section IV of the EA, "Environmental Consequences," on the basis that while Woodward indicates that he would continue his current use of the selected public lands for livestock grazing, "such indication by the proponent does not guarantee the current use will continue, and environmental consequences based on this assumption may not be correct." (SOR at 4.) NaTec complains that the EA fails to address "significant adverse impacts to wildlife populations or habitat, which would occur from the exchange of lands if future uses of the selected lands were to change." Id. In NaTec's opinion, BLM should have provided a basis for its conclusion that "direct or indirect effects of development of the selected lands on wildlife habitat or populations would not be significant." Id. NaTec faults BLM for concluding that "no significant or beneficial or adverse impacts to visual resources would occur from the exchange of lands," pointing out that BLM also states that "if development were to occur on the selected lands, visual resources 'might not be significantly affected.'" Id. (emphasis supplied by NaTec). NaTec maintains that the environmental consequences of the exchange remain "largely unknown," and that a "proper evaluation of the environmental consequences of the exchange was not completed." Id.

In its SOR, NaTec revisits its primary argument that the exchange is calculated to sever NaTec's ability to access the public land from its own land. We set forth this argument below:

The approximately 120 acres of the selected land located in Section 33, Township 3 South, Range 94 West of the 6th P.M., is adjacent to land owned by NaTec. NaTec had continuously expressed its objection that exchange of this land would sever NaTec's ability to access public land located adjacent to its property. The State Director ignored NaTec's concerns in this

regard, stating in his Decision that other legal public access to adjacent public land is available. The quality of this other legal access is not addressed. However, the Record of Decision in this case recognizes that access to the selected lands is not convenient and uses the lack of convenient access as one (1) of several criteria to determine that the combined public values of the offered private land exceeds the public values of the selected public lands. In this regard, the issue of access appears to be selectively and arbitrarily used to justify the State Director's decision.

The proposed exchange of the land adjacent to NaTec's property appears calculated to sever NaTec's ability to access the public land from NaTec's property and thereby attempt to regulate or charge a fee to NaTec for use of the public lands adjacent to the exchanged land. Because of the lack of convenient access to the federal lands adjacent to the exchanged land, NaTec's ability to use the adjacent federal lands has been diminished. Access to the public land was an important consideration when the land was purchased from Mr. Woodward. It is very obvious that the selection of the exchange lands was designed to frustrate the access that NaTec purchased from Mr. Woodward. 43 USC Section 1716(a) provides that when considering public interest in exchanges of public lands, full consideration shall be given to, among other things, the needs of local people.

Contrary to the statute, NaTec's need for access to the federal lands adjacent to its property were not considered in the land exchange, because no consideration was given to allow NaTec to have continued access to federal lands from NaTec's property.

Id. at 5.

For these reasons, NaTec urges the Board to vacate the patent issued to Woodward, concluding that "the decision to complete the exchange is arbitrary and capricious and not in the public's interest." Id. at 6.

[1] Exchanges of public land for private land are authorized by section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1994), upon a finding by the Secretary of the Interior that the public interest will be "well served." The statute directs that the Secretary, in considering the public interest,

shall give full consideration to better Federal land management and the needs of the State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and [authorizes disposal by exchange provided that] the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained

in Federal ownership are not more than the value of the non-Federal lands or interests and the public objectives they could serve if acquired.

43 U.S.C. § 1716(a) (1994). The weight to be given every element bearing on such decisionmaking is left to the discretion of the Secretary. John S. Peck, 114 IBLA 393, 397 (1990). An obvious corollary to a determination of whether the transfer of public land would serve the public interest is the evaluation of whether the transfer would adversely impact upon the public interest. Thus, BLM must assess the impact of proposed or anticipated development of the public land it passes out of Federal ownership. City of Santa Fe, 103 IBLA 397 (1988).

Protests against an exchange are properly dismissed if the protestants do not establish that the proposed exchange would violate the Act, applicable regulations, or contravene the public interest. John S. Peck, *supra*, at 397; City of Santa Fe, *supra*, at 402. We find no support for NaTec's allegations that the exchange of public lands to Woodward is contrary to the statute or the regulations.

We agree with counsel for BLM's response to NaTec's argument that the exchange adversely affects its operations on adjacent Federal sodium leases owned by NaTec, and will impede the enlargement of the Larson Reservoir in which water for NaTec's operations is stored:

Assuming for the sake of discussion that all of the allegations made * * * are correct, and that the exchange may not be in NaTec's best interest, it does not necessarily follow that it is not in the public interest. "While the Speirs [NaTec] may be adversely affected by exchange of the Federal Lands, this fact is not sufficient to show that the exchange is not in the interest of the United States." John S. Peck, et al., 114 IBLA 393, 397 (1990). The fact that NaTec is mining sodium from adjacent public land pursuant to leases issued by the BLM does not obligate the BLM to maintain ownership of and manage other public land contiguous to the leased land in order to facilitate NaTec's operations. In any event, NaTec's unsupported allegations notwithstanding, there is no evidence that the consummation of the exchange will have a significant impact on its sodium mining operations. There is no evidence that it will be more difficult or costly to obtain rights-of-way, and other permits authorizing NaTec to use the selected land, from Mr. Woodward than it would have been to obtain them from the United States.

(Answer at 1-2.)

We further agree that NaTec has not demonstrated how a "lack of convenient access to the federal lands adjacent to the exchanged land," (SOR at 5), will significantly impact upon its ability to conduct operations on its sodium leases, "much less why a lack of 'convenient' access for NaTec would justify a finding that the exchange in question is not in the public

interest." (Answer at 4.) Whether the exchange will result in an inconvenience to NaTec is not the standard by which to determine whether the exchange is in the public interest. In Jesse B. Knopp, 133 IBLA 263 (1995), the appellant argued that the proposed exchange would be detrimental to the operation of his ranch. The Board found that BLM had fully considered the impacts of the exchange on his ranching operation, stating: "First, it is not clear that transferring these lands from Federal ownership will preclude use by Knopp. Second, even if all use is precluded, the public benefits of the exchange outweigh any potential economic hardship to Knopp." Id. at 265-66 (footnote omitted). Likewise, in Barrett S. Duff, 122 IBLA 244 (1992), the appellant contended that the proposed exchange would adversely affect his interests in Federal oil and gas leases. The Board rejected the argument as a basis for condemning the exchange, observing that "[w]hile appellant may be individually inconvenienced by the exchange, this fact is not sufficient to show that the exchange is not in the interest of the United States." Id. at 249.

We find that the exchange involved in this case is in the public interest, given that its objective is to "provide legal access to federal lands and to consolidate public and private land holdings." 56 Fed. Reg. at 24088.

[2] The third section of NaTec's SOR is captioned: "THE LAND EXCHANGE IS NOT IN THE PUBLIC INTEREST." As noted by counsel for BLM, "[w]hat follows, however, are allegations relating to the sufficiency of the EA the BLM prepared for the exchange." (Answer at 5.) Upon review of the EA, we conclude that NaTec's challenge to its sufficiency is without merit.

In determining that the exchange proposed by Woodward would be in the public interest, BLM emphasized that the private lands offered by Woodward "contain an existing road that has been identified by Bureau staff and Department of Energy staff as important for providing public and administrative access to federal lands." (EA at II.A.) Counsel for BLM states that by obtaining title to that land, "BLM has secured permanent and unrestricted access to the Federal lands, access that may be used by the general public as well as agencies of the Federal Government." (Answer at 5.) The Bureau stated that the "No Action Alternative" "would result in the continued lack of access to federal lands that would have to be resolved through other means." (EA at II.B.)

NaTec contends that BLM offered an inadequate explanation as to why BLM rejected the alternative of constructing an alternate route around the offered private land, rather than proceeding with the exchange. In this regard, BLM states:

The Department of Energy (DOE) has considered constructing an alternative route around the offered land. The most feasible route would require construction of approximately 4,800 feet of new road and improvement of approximately 11,700 feet of existing road, with an estimated cost of \$50,000. It would be more

environmentally damaging than the use of the existing road across the offered private lands, and should not be considered unless the exchange could not be completed.

(EA at II.C.5.) Noting that BLM rejected this alternative "somewhat summarily, but certainly not without justification," counsel for BLM properly contends that "[t]he rejection of this alternative needs no prolonged justification." (Answer at 5-6.) In our view, BLM's conclusion that construction of a new road would be more environmentally damaging than use of the existing road is a statement of the obvious.

In addition, BLM states that "[a] route analysis prepared for the acquisition project indicates the Cow Creek Road [the existing road] is the most suitable route for both public access and administrative access for equipment and commercial vehicles." (EA at III, par. 10.) The Bureau explains that rights-of-way or easements have been reserved or obtained on all portions of the existing road, except for the portion which crosses the private land offered by Woodward, who does not wish to grant an access easement across his property, but is willing to consider an exchange. Id.

NaTec challenges BLM's statement that "critical elements," such as air quality, would not be affected by any of the alternatives considered. Given that a stated purpose of the exchange was to provide public and administrative access to other Federal lands, NaTec reasons, the "increased access will result in increased public and commercial vehicle traffic, which will necessarily affect air quality, which the Environmental Assessment failed to address." (SOR at 4.) Again, we agree with counsel for BLM's response to this argument:

There is, however, no evidence the exchange will result in "increased" traffic on the road. As the EA points out, it is not anticipated that the exchange will result in increased use of the road that traverses the selected land. The exchange simply secures permanent access to Federal lands for current users of the existing road, including those who have had to negotiate for access with the owner of the offered land. See EA Secs. III and IV. If the existing road across the offered land is to be used in the future in connection with some unforeseen project, the impacts of the use of the road for that project and the mitigation measure needed, if any, will be addressed in the environmental document prepared for the project.

(Answer at 6.)

The Bureau observes in section IV.A. of the EA that during negotiations on the exchange, Woodward indicated that his current use of the selected public land for livestock grazing would continue, and that the description of the environmental consequences of the proposed exchange were based on this assumption. NaTec complains that this "indication by the proponent does not guarantee the current use will continue, and environmental consequences based on this assumption may not be correct." (SOR

at 4.) NaTec faults BLM for not providing a basis for concluding that the direct or indirect effects of development of the selected lands on wildlife habitat or populations would not be significant. According to NaTec, "the EA fails to address significant adverse impacts to wildlife populations or habitat, which would occur from the exchange of lands if future uses of the selected lands were to change." Id.

In response to this argument, counsel for BLM correctly states that BLM was not "required to consider `remote and highly speculative consequences,'" quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). He states that BLM properly applied the "rule of reason," which is, "whether an EIS [or EA] contains a `reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982), quoting Trout Unlimited v. Morton, *supra*. He maintains that "BLM was not required to include a `worst case analysis' in its EA." (Answer at 7, quoting Robertson v. Methow Valley Citizens, 490 U.S. 332, 354 (1989).)

The Board's analysis and ruling in Howard B. Keck, Jr., *supra*, at 47, provides complete support for the response submitted by counsel for BLM. In Keck the appellant was concerned that once conveyed, the public land proposed for exchange would pass to Travertine Corporation (Travertine), which would facilitate development of the land into a resort community. Both BLM and Travertine admitted that the land would ultimately pass to Travertine, which intended to seek approval of a plan of development of the land, which had been designated by local plans for development as a resort community.

The Board began its analysis in Keck by observing: "Where private development of public land is not the intended or likely consequence of a conveyance of that land out of Federal ownership, it is safe to say that BLM generally need not consider such development in conjunction with analyzing the environmental impact of a proposed exchange." Id. However, the Board reasoned, "[w]here, at the time it was deciding whether to go ahead with the exchange, BLM was aware that development was likely to occur following the exchange, it was required to assess not only the environmental impact of the exchange, but also the impact of any development that might result from the exchange." Id. Having made the finding that BLM should have considered the environmental impact of the anticipated development resulting from the exchange, the Board noted that the finding "still leaves the question of the proper scope of such review." Id. at 48. The Board stated that "[a]bsent formulation of a precise plan for the development of public land, it is virtually impossible for BLM, at the time it is deciding whether to proceed with a proposed exchange, to assess the specific environmental impact of development." Id. Further, the Board stated that "[i]n these circumstances, it is clear that the intended development of the selected public land is not sufficiently definite to permit a full review of its likely environmental impact." Id. at 50. The Board concluded "that to require BLM to assess the environmental impacts of development, beyond those already addressed in the EA, would constitute an exercise in `crystal ball inquiry,' which is not required by NEPA

[the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1988)]." Howard B. Keck, Jr., supra, at 50, quoting Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

In the instant case, Woodward has indicated that the historical use of the selected public land, i.e., livestock grazing, would continue. NaTec insists that BLM should have considered the environmental consequences if the public lands were to become subject to "development," but fails to offer a discussion of what kind of development might take place. We conclude that BLM properly based its consideration of the environmental consequences of the exchange on the assumption that the selected public land would continue to be used for livestock grazing. To require BLM to speculate about other possible future uses of the land, and to attempt to assess the environmental impacts of those future uses, would constitute a "crystal ball inquiry." Howard B. Keck, Jr., supra.

[3] NaTec has requested a hearing on the following "questions of fact" pertaining to BLM's decision:

- a. Whether NaTec owns an easement on the exchanged land pursuant to the Act of July 26, 1866, 43 USCA 661, et seq.
- b. Whether selection of the exchanged land is contrary to the agreements and conveyances between NaTec and Mr. Woodward.
- c. Whether additional terms and conditions should be included in Patent No. 05-92-0022 issued to Mr. Woodward to reflect the agreement of Mr. Woodward and the agreements and conveyances between NaTec and Mr. Woodward.
- d. Whether selection of the exchanged land will impair NaTec's use and development of the Sodium leases.

In his response to NaTec's request for a hearing, BLM's counsel cites to the proper standard to be applied in determining whether a hearing would be appropriate:

[The appellant] offers no showing that an administrative law judge would be better able to make a reasoned decision on the basis of an oral hearing than could BLM or this Board make on the existing record. No offer of further evidence has been made. A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the appeal. E.g., Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); Kim Evans, 82 IBLA 319, 323 (1984). This Board "should grant a hearing when there are significant factual or legal issues remaining

to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, supra at 417.

Woods Petroleum Co., 86 IBLA 46, 55 (1985), quoted in Sealaska Corp., 115 IBLA 249, 255 (1990); see also Felix F. Vigil, 129 IBLA 345, 347 (1994), and cases cited therein.

We agree that a hearing is not warranted in this case. Counsel for BLM correctly states that the issue to be decided by this Board is "whether the exchange that has been consummated is in the public interest," and that "[n]one of the issues NaTec believes should be addressed in a hearing are material to that question." (Response to Request for Hearing at 2.) Rather, he states, such issues "relate to the question of whether the exchange is in NaTec's interest." Id. Moreover, we agree with his contention that any dispute as to the existence of an easement on the lands exchanged to Woodward created pursuant to the terms of the Act of July 26, 1866, as well as disputes regarding other agreements between NaTec and Woodward, may be resolved in an appropriate judicial forum. Id.

In conclusion, we rule that the record establishes that this exchange is in the public interest. NaTec has failed to significantly dispute the findings made by BLM concerning the proposed exchange. As counsel for BLM properly states, while NaTec may be individually inconvenienced by the exchange, this fact is not sufficient to show that the exchange is not in the interest of the United States. As there has been no showing that the exchange is contrary to the public interest nor any demonstration that there is an error in the exchange process itself, the decision to deny the protest must be affirmed. See, e.g., Jesse B. Knopp, supra; Barrett S. Duff, supra; John S. Peck, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James L. Byrnes
Chief Administrative Judge

I concur:

David L. Hughes
Administrative Judge